Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Petitioners,

v.

FERN SLOTKY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the spousal attribution rule of Treasury Regulation § 1.414(c)-4(b)(5), which deems an individual the owner of "an interest owned, directly or indirectly, by or for his or her spouse . . .", and has been adopted by the PBGC to implement ERISA's definition of the "single employer" responsible for withdrawal liability, 29 U.S.C. § 1301(b)(1), be limited to: (a) instances where an individual and his or her spouse already own a "significant interest" in one or more businesses; or (2) imputing the ownership of "business assets" to an individual from his or her spouse.

PARTIES TO THE PROCEEDINGS

The petitioners are the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, a pension plan, and Paul L. Glover, John R. Johnson, John Broderick and William Carpenter, in their capacities as trustees of the pension plan. The respondent is Fern Slotky.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND REGULATIONS INVOLVED	2
STATEMENT	2
1. Stevens Bedding's complete withdrawal and the Pension Fund's litigation with Burton Slotky	2
2. The Pension Fund's lawsuit against Fern Slotky	3
3. The court of appeals' initial interpretations of the spousal attribution rule—the *Ditello* and *Johnson* cases	5
4. The court of appeals' interpretation of the spousal attribution rule in this case	6
REASONS FOR ALLOWING THE WRIT	6
I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE TREASURY AND PBGC REGULATIONS IMPLEMENTING 29 U.S.C. § 1301(b)(1)	6
II. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING COLLECTION OF WITHDRAWAL LIABILITY THROUGH THE TREASURY AND PBGC REGULATIONS IMPLEMENTING 29 U.S.C. § 1301(b)(1)	10
CONCLUSION	16
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

Automobile Underwriters v. Tite, 119 Ind. App. 241, 85 N.E.2d 365 (1949) 12
Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra, 983 F.2d 495 (3rd Cir. 1992) 9, 10
Central States Pension Fund v. Ditello, 974 F.2d 887 (7th Cir. 1992) 5, 9
Central States Pension Fund v. Johnson, 991 F.2d 387 (7th Cir. 1992) 5, 8, 10, 11
Central States Pension Fund v. Johnson, 778 F. Supp. 425 (N.D. Ill. 1991), *rev'd*, 991 F.2d 387 (7th Cir. 1992) 5
Central States Pension Fund v. Navco, 3 F.3d 167 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (U.S. Dec. 20, 1993) (No. 93-974) 12
Central States Pension Fund v. Slotky, 956 F.2d 1369 (7th Cir. 1992) 3
Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund, 508 U.S. ——, 113 S.Ct. 2264 (1993) 7
Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986) 7
First National Bank of Leesburg v. Hector Supply Co., 254 So.2d 777 (Fla. 1971) 3
IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3rd Cir. 1986) 10
In re Stanley, 122 B.R. 599 (Bankr. M.D. Fla. 1990) 3
Pension Benefit Guaranty Corp. v. East Dayton Tool & Die Co., No. 93-3185, —— F.3d —— (6th Cir. Jan. 24, 1994) 14
Pension Benefit Guaranty Corp. v. Ouimet Corp., 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) 15
Pension Benefit Guaranty Corp. v. LTV Corp., 493 U.S. 932 (1990) 15

TABLE OF AUTHORITIES—Continued

	Page
Robbins v. Pepsi-Cola Metropolitan Bottling Co., 636 F. Supp. 641 (N.D. Ill. 1986)	14
United States v. Vogel Fertilizer Company, 455 U.S. 16 (1982)	14
Western Conference of Teamsters Pension Trust Fund v. LaFrenz, 837 F.2d 892 (9th Cir. 1988)	9, 12
FEDERAL STATUTES:	
26 U.S.C. § 414(c)	15
26 U.S.C. § 1563	14, 15
26 U.S.C. § 1563(e)(1)	10
26 U.S.C. § 1563(e)(5)	10, 15
28 U.S.C. § 1254(1)	2
29 U.S.C. § 1132(e)(1)	4
29 U.S.C. § 1362(b)	14-15
29 U.S.C. § 1383(a)(1)	2
29 U.S.C. § 1392(c)	14
29 U.S.C. § 1301(b)(1)	*passim*
29 U.S.C. § 1451(c)	4
FEDERAL RULES:	
Fed. R. App. P. 35(a)(1)	9
Fed. R. Civ. P. 12(b)(6)	4
FEDERAL REGULATIONS:	
26 C.F.R. § 1.414(c)-2	2
26 C.F.R. § 1.414(c)-2(a)	7, 13
26 C.F.R. § 1.414(c)-2(b)(2)	12
26 C.F.R. § 1.414(c)-2(b)(2)(i)(A)	7
26 C.F.R. § 1.414(c)-2(b)(2)(i)(D)	8, 13
26 C.F.R. § 1.414(c)-2(c)(1)	7, 12, 13
26 C.F.R. § 1.414(c)-2(c)(1)(i)	8
26 C.F.R. § 1.414(c)-2(c)(2)	12
26 C.F.R. § 1.414(c)-2(c)(2)(i)	8
26 C.F.R. § 1.414(c)-2(c)(2)(iv)	8, 13
26 C.F.R. § 1.414(c)-4	2
26 C.F.R. § 1.414(c)-4(a)	8, 9, 11, 13
26 C.F.R. § 1.414(c)-4(b)(1)	10, 13
26 C.F.R. § 1.414(c)-4(b)(2)	13
26 C.F.R. § 1.414(c)-4(b)(3)	13

TABLE OF AUTHORITIES—Continued

	Page
26 C.F.R. § 1.414(c)-4(b)(4)	13
26 C.F.R. § 1.414(c)-4(b)(5)	*passim*
26 C.F.R. § 1.414(c)-4(b)(5)(i)	8
26 C.F.R. § 1.414(c)-4(b)(6)	13
26 C.F.R. § 1.414(c)-4(c)(1)	8
29 C.F.R. § 2612.1	2, 7
29 C.F.R. § 2612.2	2, 7
MISCELLANEOUS:	
126 Cong. Record 23038 (August 25, 1980)	3, 11
S. Rep. No. 93-383, 93rd Cong., 2d Sess. 43, *reprinted in* [1974] U.S. Code Cong. & Admin. News 4639	7
H. Rep. No. 93-807, 93rd Cong., 2d Sess. 50, *reprinted in* [1974] U.S. Code Cong. & Admin. News 4670	7

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, Paul L. Glover, John R. Johnson, John Broderick and William Carpenter respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-3a, is reported at 9 F.3d 1251 (7th Cir. 1993). The opinion of the district court, App., *infra*, at 4a-5a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1), is set forth in the appendix, App., *infra*, at 6a. Sections 2612.1 and 2612.2 of the final regulations of the Pension Benefit Guaranty Corporation ("PBGC"), 29 C.F.R. §§ 2612.1 and 2612.2, are set forth in the appendix, App., *infra*, at 6a-7a. Sections 1.414(c)-2 and 1.414(c)-4 of the final regulations of the Secretary of the Treasury, 26 C.F.R. §§ 1.414(c)-2 and 1.414(c)-4, are set forth in the appendix, App., *infra*, at 7a-11a.

STATEMENT

This case involves the efforts of a multiemployer pension plan to collect a withdrawal liability debt from a "single employer", as defined in 29 U.S.C. § 1301(b)(1), through application of the substantive Treasury Regulations adopted by the PBGC.

1. *Stevens Bedding's complete withdrawal and the Pension Fund's litigation with Burton Slotky.* On August 14, 1987, Stevens Bedding Warehouse, Inc. ("Stevens"), a contributor to the Pension Fund, ceased operations, triggering a "complete withdrawal" from the Fund. 29 U.S.C. § 1383(a)(1). R. 1: Complaint paras. 16-17. On August 17, 1987, Stevens filed a petition for reorganization, which was eventually converted to a Chapter 7 liquidation. *Id.* para. 5.

ERISA authorizes a pension plan to collect withdrawal liability from the "single employer", defined as all trades

or businesses under common control. 29 U.S.C. § 1301 (b)(1). On the date of Stevens' withdrawal from the Fund, its sole shareholder, Burton Slotky, owned an unincorporated business which leased two pieces of real estate to Stevens for use in its business. R. 1: Complaint paras. 8-11.

In 1991, the Pension Fund sued Burton Slotky for its withdrawal liability debt of $150,509.00. R. 1: Complaint paras. 6, 19. While this lawsuit was pending, on February 24, 1992, the court of appeals affirmed a judgment against Mr. Slotky in favor of another pension plan, and held that his ownership of an unincorporated leasing business under common control with Stevens rendered him liable for Stevens' withdrawal liability. *Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992). Following this decision, Petitioners obtained a judgment against Mr. Slotky, from which no appeal has been prosecuted.

2. *The Pension Fund's lawsuit against Fern Slotky.* Because Burton Slotky and his wife are Florida residents, R. 1: Complaint paras. 6-7, and Florida law insulates property owned by a husband and wife in an "estate by the entireties" from one spouse's creditors [1], on March 26, 1992, the Fund sued Fern Slotky, the wife of Burton Slotky. R. 1: Complaint. The jurisdiction of

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[1] *In re Stanley*, 122 B.R. 599, 604 (Bankr. M.D. Fla. 1990) ("property held by a husband and wife in an estate by the entireties belongs to neither spouse, but to a separate and distinct entity referred to as the 'unity' or 'the marriage' "); *accord First National Bank of Leesburg v. Hector Supply Co.*, 254 So. 2d 777 (Fla. 1971) (joint bank account held in tenancy of the entireties not subject to husband's debt). Other states do not have such a rule. Thus, a pension plan's right to recover withdrawal liability will vary from state to state, and hinge on the fortuitous coincidence of the employer's residency. Such obstacles to the collection of withdrawal liability will thwart Congress' objective to avoid converting "simple collection actions brought by plan trustees . . . into lengthy, costly, and complex litigation . . . ." 126 Cong. Rec. 23038, 23039 (Aug. 25, 1980) (Rep. Thompson).

the district court was invoked under Sections 502(e)(1) and 4301(c) of ERISA, 29 U.S.C. §§ 1132(e)(1) and 1451(c). R. 1: Complaint para. 3. The Fund's claim against Mrs. Slotky was based on the regulations implementing Section 1301(b)(1), specifically Treasury Regulation § 1.414(c)-4(b)(5), referred to as the "spousal attribution rule". This regulation provides in relevant part:

> (5) *Spouse*—(i) *General rule.* Except as provided in paragraph (b)(5)(ii) of this section, an individual shall be considered to own an interest owned, directly or indirectly, by or for his or her spouse, other than a spouse who is legally separated from the individual under a decree of divorce, whether interlocutory or final, or a decree of separate maintenance.
>
> (ii) *Exception.* An individual shall not be considered to own an interest in an organization owned, directly or indirectly, by or for his or her spouse on any day of a taxable year of such organization, provided that each of the following conditions are satisfied with respect to such taxable year:
>
> * * * *
>
> (C) Not more than 50 percent of such organization's gross income for such taxable year was derived from royalties, rents, interest, and annuities . . . .

The Fund alleged that under this regulation, Mrs. Slotky was deemed the owner of her husband's real estate leasing business, and the exception to spousal attribution was not applicable because the proprietorship's income was derived entirely from rents. R. 1: Complaint para. 15. Because that business was operated as a sole proprietorship, the Fund alleged that Mrs. Slotky was personally liable for the withdrawal liability debt. *Id.* Defendant moved to dismiss the Fund's complaint pursuant to Fed. R. Civ. P. 12(b)(6). R. 7-8. She conceded, however, that she could not avail herself of the exception to the attribution rule. R. 15: Reply Memorandum of Law at 1-2.

On August 20, 1992, the district court granted defendant's motion, and entered judgment in her favor. R. 19-20: Judgment and Order, App., *infra,* at 4a-5a. The district court adopted the earlier interpretation of the spousal attribution rule espoused by another district court judge in *Central States Pension Fund v. Johnson,* 778 F. Supp. 425 (N.D. Ill. 1991).

3. *The court of appeals' initial interpretations of the spousal attribution rule—the* Ditello *and* Johnson *cases.* While the Pension Fund's appeal was pending, two panels of the court of appeals interpreted the spousal attribution rule in an ERISA withdrawal liability context. In *Central States Pension Fund v. Ditello,* 974 F.2d 887 (7th Cir. 1992), the court of appeals held that even though an individual was the sole title owner of a corporation and proprietorship under common control, that status was "irrelevant" to whether his spouse would be treated as an owner of the businesses. The court of appeals reasoned that under the MPPAA's spousal attribution rule, the individual's "interest in [the withdrawn entity] and the proprietorship are attributable to his wife" such that they were "deemed to have a 100% interest in both businesses." 974 F.2d at 891 n. 1.

In *Ceneral States Pension Fund v. Johnson,* 991 F.2d 387 (7th Cir. 1992), however, the court held that the spousal attribution rule cannot be used to impute an individual's ownership interest of a business organization to his or her spouse unless "each spouse owns a significant interest in one or more businesses." *Id.* at 391. Because the spouse in *Johnson* "d[id] not own any businesses on her own", the panel viewed the regulation has having "no effect . . . ." *Id.* at 390. "[D]eclin[ing] to create a rule that one spouse's ownership interest in an unincorporated trade or business will automatically be imputed to the other spouse in order to extend personal liability to him or her", the *Johnson* panel opted instead for a subjective standard of its own creation "that both spouses will be liable for a business's unmet pension obligations

only when they intended to be partners in that enterprise." *Id.* at 388.

4. *The court of appeals' interpretation of the spousal attribution rule in this case.* The court of appeals in this case affirmed the dismissal of the Pension Fund's complaint, and rejected the Fund's arguments that the *Johnson* decision had misinterpreted the spousal attribution rule. App., *infra*, at 2a. Endorsing *Johnson* as the correct interpretation of the regulation, the *Slotky* panel held that the regulation is properly construed as attributing the ownership of "particular assets" used in a business from an individual to his or her spouse:

> *Johnson* holds that a spouse may own property used in a business without becoming a proprietor or partner in that business, and that the spouse therefore becomes liable for a controlled group's withdrawal liability "only when [both spouses] intended to be partners in that enterprise."
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> * * * *
>
> *Johnson* understands the tax regulations as making the spouse an owner of particular assets; whether the owner of assets used in a business is liable as a partner depends, we held in *Johnson*, on the intent of the parties involved.

App., *infra*, a 2a-3a (insert in original).

REASONS FOR ALLOWING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE TREASURY AND PBGC REGULATIONS IMPLEMENTING 29 U.S.C. § 1301(b)(1).

Congress enacted the withdrawal liability provisions of ERISA, which require employers to pay their proportionate share of a pension plan's unfunded vested liability, in order to " 'guarantee that if a worker has been prom-

ised a defined pension upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust Fund*, 508 U.S. ——, 113 S.Ct. 2264, 2271-2272 (1993), *quoting, Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 214 (1986). To prevent employers from circumventing their obligations to pension plans by fractionalizing their operations, Congress extended the obligation to pay withdrawal liability to the "single employer," defined as all trades or businesses in a group under "common control". 29 U.S.C. § 1301(b)(1); *see* S.Rep. No. 93-383, 93rd Cong., 2d Sess. 43, *reprinted in* [1974] U.S. Code Cong. & Admin. News 4639, 4890, 4928; H.Rep. No. 93-807, 93rd Cong., 2d Sess. 50, *reprinted in* [1974] U.S. Code Cong. & Admin. News 4670, 4716. Congress further directed the PBGC to promulgate regulations "consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26". 29 U.S.C. § 1301(b)(1). The PBGC complied with this directive by adopting the Treasury Regulations issued pursuant to Section 414(c) of the Internal Revenue Code. 29 C.F.R. §§ 2612.1 and 2612.2.

These regulations focus on whether an "organization" (whether "a sole proprietorship, a partnership . . ., a trust, an estate, or a corporation") is part of a group of businesses under common control. 26 C.F.R. § 1.414(c)-2(a). One control group is the "brother-sister" group, 26 C.F.R. § 1.414(c)-2(a), which exists if the same five or fewer persons own a "controlling interest" in, and exercise "effective control" over, the organizations. 26 C.F.R. § 1.414(c)-2(c)(1).[2]

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[2] The controlling interest of a corporation is ownership of at least 80% of the stock, 26 C.F.R. § 1.414(c)-2(b)(2)(i)(A), while effective control is ownership of more than 50% of the total com-

To determine whether common control exists, the regulations mandate examination of not only the organization's direct owner, but also the application of certain constructive ownership rules. 26 C.F.R. §§ 1.414(c)-2(c)(1)(i) and 1.414(c)-4(a). One such constructive ownership rule is the spousal attribution rule which provides, in relevant part, that "an individual shall be considered to own an interest owned, directly or indirectly, by or for his or her spouse . . . ." 26 C.F.R. § 1.414(c)-4(b)(5)(i). The "interest" imputed to a spouse is "stock" where the organization is a corporation "and in the case of a sole proprietorship, the proprietorship". 26 C.F.R. § 1.414(c)-4(a). Once ownership of an interest is attributed to an individual under these rules, it "shall . . . be treated as actually owned by such person." 26 C.F.R. § 1.414(c)-4(c)(1).

Relying not upon the language of the regulation but upon its own conclusion as to the regulation's "purpose", the Seventh Circuit in *Central States Pension Fund v. Johnson*, 991 F.2d 387, 390-391 (7th Cir. 1993), held that the spousal attribution regulation may only be used when each spouse owns a "significant interest" in one or more businesses, a term which the court did not define and which does not appear in the regulations. In this case, the Seventh Circuit endorsed *Johnson* as the correct interpretation of the spousal attribution rule, but in an even more narrow analysis held that the rule should be limited to imputing the ownership of "particular assets" used in the business, regardless of whether the spouse owned any interest in the business itself. App., *infra*, at 3a.

The Seventh Circuit's reading of the spousal attribution rule conflicts with that adopted by the Ninth Cir-

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bined voting power of all the classes of stock entitled to vote. 26 C.F.R. § 1.414(c)-2(c)(2)(i). Where the organization is a sole proprietorship, the controlling interest and effective control of the entity is its ownership. 26 C.F.R. §§ 1.414(c)-2(b)(2)(i)(D); 1.414(c)-2(c)(2)(iv).

cuit in *Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837 F.2d 892, 894 (9th Cir. 1988). There, the court held that: (1) it was "immaterial" (and no barrier to the application of the regulation) that the spouse was not the direct owner of an interest in a business; and (2) through application of the attribution rule, the spouse was deemed to own "[a]n interest in an organization" and not merely the "particular assets" used by the business. The Ninth Circuit faithfully applied the regulation in both respects. The regulation deems an individual the owner of "an interest owned, directly or indirectly, by or for his or her spouse", without engrafting a limitation that the individual must first own some interest (significant or otherwise) in the business. And the Ninth Circuit followed the regulations' definition of an "interest" that is attributed to an individual from his or her spouse as more than "particular assets", but rather "in the case of a corporation, stock; . . . and in the case of a sole proprietorship, the proprietorship." 26 C.F.R. § 1.414(c)-4(a).[3]

Moreover, the Seventh Circuit's refusal to apply the Treasury Regulations to impute ownership of a business, and limiting the rules to making individuals the constructive owners of business assets, conflicts with the holdings of other courts that the attribution rules impute ownership of a business to its constructive owners. *Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra*, 983 F.2d 495, 502 (3rd

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[3] The Seventh Circuit originally followed *Lafrenz* in holding that the fact that one individual was the sole owner of an organization was "irrelevant" to the application of the spousal attribution rule, *Central States Pension Fund v. Ditello*, 974 F.2d 887, 891 n.1 (7th Cir. 1992), but that ruling was described as dictum in the court below. App., *infra*, at 2a. The identical issue is presented in yet another case now pending before the Seventh Circuit. *Chicago Truck Drivers Pension Fund v. Steinberg*, No. 93-3432 (7th Cir. appeal docketed Oct. 8, 1993). On January 14, 1994, the Fund filed its brief and a suggestion for hearing in banc pursuant to Fed. R. App. 35(a)(1).

Cir. 1992); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 122-125 (3rd Cir. 1986).[4] These conflicts justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING COLLECTION OF WITHDRAWAL LIABILITY THROUGH THE TREASURY AND PBGC REGULATIONS IMPLEMENTING 29 U.S.C. § 1301(b)(1).

The Seventh Circuit's opinion in this case reflects important statutory considerations growing out of the efforts of pension plans to collect withdrawal liability to the full extent allowed by Congress in 29 U.S.C. § 1301(b)(1). And particularly since this Court has not had occasion to address these matters since the 1980 amendments to ERISA, which established withdrawal liability, there are compelling reasons why some definitive instruction as to the scope of § 1301(b)(1) should be provided by this Court.

The Seventh Circuit in *Central States Pension Fund v. Johnson*, 991 F.2d 387, 390 n.4 (7th Cir. 1993), aptly described the courts' interpretation of the spousal attribution rule as the subject of "confusion". Such uncertainty as to the proper application of the control group

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[4] The Third Circuit in *Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra*, 983 F.2d 495, 502 (3rd Cir. 1992) and *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 122-125 (3rd Cir. 1986) interpreted the attribution rule for the holder of an "option" in withdrawal liability collection actions. However, the court did not rely upon Treasury Regulation § 1.414(c)-4(b)(1), which attributes an ownership interest to the holder of an option. Instead, the court cited upon the virtually identically worded attribution rule of 26 U.S.C. § 1563(e)(1), which governs the limitation on the surtax exemption. The Internal Revenue Code's surtax provisions contain their own spousal attribution rule, which provides in relevant part that "[a]n individual shall be considered as owning stock in a corporation owned, directly or indirectly, by or for his spouse . . . ." 26 U.S.C. § 1563(e)(5).

doctrine is the antithesis of Congress' goal in adopting this standard, which was to provide for the collection of withdrawal liability "efficaciously . . . ." 126 Cong. Record 23038, 23039 (August 25, 1980) (Rep. Thompson). Litigants and lower courts need this Court's guidance to accomplish Congress's goals in adopting § 1301 (b)(1).

Among the unanswered questions thus posed are:

(1) Should the attribution required by the Treasury Regulations be limited to "particular assets" used in the business, as the Seventh Circuit held, or should the regulations be extended to deem an individual an owner of the business organization. The Seventh Circuit in this case held that the spousal attribution rule makes an individual "an owner of particular assets" used in his or her spouse's business, even if that individual owns no interest in the business. App., *infra*, at 3a. This conclusion conflicts with the court's earlier holding in *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993), that attribution under the regulation is not permissible unless "each spouse owns a *significant* interest in one or more businesses." *Id.* at 391 (emphasis supplied). Neither standard, however, finds support in the text of the regulation, which deems an individual the owner of "an *interest* owned . . . by or for his or her spouse . . . ." 26 C.F.R. § 1.414(c)-4(b)(5) (emphasis supplied). The regulations further provide that "the term 'interest' means: in the case of a corporation, stock; . . . and in the case of a sole proprietorship, the proprietorship." 26 C.F.R. § 1.414(c)-4(a).

The Seventh Circuit's attempt to introduce a fluid concept into the withdrawal liability collection scheme—that the spousal atribution rule is restricted to imputing ownership of "particular assets" or that the rule may be used to impute ownership of an organization to an individual only where he or she already owns a "significant interest" in the business—provides pension plans no standards by which to

enforce the control group principles. The Treasury Regulations contain no definition of "particular assets" or a "significant" interest, but rather speak in terms of a "controlling interest" and "effective control". 26 C.F.R. § 1.414 (c)-2(c)(1). Unlike the Treasury Regulations, which define these phrases with precision, 26 C.F.R. §§ 1.414 (c)-2(b)(2) and 1.414(c)-2(c)(2), the Seventh Circuit offers no guidance to plan sponsors or employers as to what is meant by the terms "particular assets" or "significant" interest. In another context, the Seventh Circuit observed that locating all businesses which comprise a control group "can be a difficult task . . . ." *Central States Pension Fund v. Navco*, 3 F.3d 167, 172 (7th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3430 (U.S. Dec. 20, 1993) (No. 93-974). This recognized difficulty will be exacerbated if there is no explicit standard by which pension plans, employers or the courts can measure whether common control exists.

(2) Should common law definitions of property dictate the ownership of a business for purposes of determining common control under § 1301(b)(1), as the Seventh Circuit held, or should the court follow the comprehensive regulatory scheme for defining ownership delineated by the Treasury Regulations. The Seventh Circuit premised its holding that the spousal attribution rule is limited to imputing ownership of business assets on the observation that "[n]o one 'owns' a proprietorship or partnership; it is just a name for a business carried on by natural persons without the shield of limited liability." App., *infra*, at 2a.[5] The Seventh Circuit assumed that it

[5] The Seventh Circuit's observation about the ownership of a sole proprietorship is reminiscent of the state property law concept that "[t]here cannot be two different sole owners of the same property as the same time." *Automobile Underwriters v. Tite*, 119 Ind. App. 241, 255, 85 N.E.2d 365, 367 (1949). As the Ninth Circuit has observed, however, the spousal attribution rule is designed to prevent the use of archaic state law property concepts to circumvent federal law. *Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837 F.2d 892, 894 (9th Cir. 1988).

was free to apply a common law standard of ownership in order to gauge whether an organization is a member of a control group. That assumption, however, is inconsistent with the Treasury Regulations which define a "brother-sister" control group in terms of a "controlling interest" and "effective control". 26 C.F.R. § 1.414(c)-2(c)(1). In the case of a sole proprietorship, these terms mean "ownership of such sole proprietorship." 26 C.F.R. § 1.414(c)-2(b)(2)(i)(D); *see* 26 C.F.R. § 1.414(c)-2(c)(2)(iv). In addition, the purpose of the regulation's attribution rules is to determine "the ownership of an interest in an organization . . . ." 26 C.F.R. § 1.414(c)-4(a). The regulation provides detailed definitions of the term "organization" as including "a sole proprietorship", 26 C.F.R. § 1.414(c)-2(a), and the "interest" that is attributed "in the case of a sole proprietorship" as "the proprietorship." 26 C.F.R. § 1.414(c)-4(a).

The Seventh Circuit attempted to buttress its holding in this case by positing that "[o]wnership without partnership is a common device. The lessor of an office space to a law firm does not become a partner in the firm and assume responsibility for its debts." App., *infra,* at 2a. The Treasury Regulations do not, however, include a lessor-lessee arrangement within the attribution rules. In addition to the spousal rule, the regulations attribute ownership to a person who "has an option to acquire any outstanding interest in an organization", 26 C.F.R. § 1.414(c)-4(b)(1), from a partnership to its partners, 26 C.F.R. § 1.414(c)-4(b)(2), from an estate or trust to its beneficiaries, 26 C.F.R. § 1.414(c)-4(b)(3), from a corporation to its shareholders, 26 C.F.R. § 1.414(c)-4(b)(4), and to an individual from his children, grandchildren, parents and grandparents under certain circumstances. 26 C.F.R. § 1.414(c)-4(b)(6). The Seventh Circuit abdicated its duty to follow these regulations by rewriting or ignoring them.

(3) To what extent is motive of the owners of a business relevant to determining the liability of that business

for withdrawal liability. The Seventh Circuit held that "a spouse may own property used in a business without becoming a proprietor or partner in that business, and that the spouse therefore becomes liable for a control group's withdrawal liability 'only when [both spouses] intended to be partners in that enterprise.' [citation]." App., *infra*, at 2a. In construing the control group principles of 26 U.S.C. § 1563 (upon which the language of the present Treasury Regulations is patterned), this Court has noted that Congress adopted this standard to substitute a "mechanical formula" in lieu of "subjective, case-by-case analysis," and that "[i]nherent in such an objective test is a sharp dividing line that is crossed by incremental changes in ownership." *United States v. Vogel Fertilizer Company*, 455 U.S. 16, 34 (1982); *see Pension Benefit Guaranty Corp. v. East Dayton Tool & Die Co.*, No. 93-3185, slip op. at 9, —— F.3d ——, App., *infra*, at 19a (6th Cir. Jan. 24, 1994) (Treasury Regulations establish a "brightline 80% control test"). Indeed, when Congress intended to adopt a subjective standard in the withdrawal liability collection scheme, it expressly so provided in 29 U.S.C. § 1392(c).

The consequences of the Seventh Circuit's interpretation of the spousal attribution rule of 26 C.F.R. § 1.414 (c)-4(b)(5) transcend the context of a single pension plan's efforts to collect withdrawal liability from a delinquent employer. ERISA's definition of the "single employer" in Section 1301(b)(1) has allowed multiemployer pension plans across the country to collect billions of dollars of withdrawal liability that otherwise would have been uncollectible from the contributing company. *See Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 652 (N.D. Ill. 1986) (pension fund sought $2.38 million for a 1981 partial withdrawal and $18.5 million for complete and partial withdrawals occurring in 1982, 1983 and 1984). The control group doctrine of Section 1301(b)(1) applies equally to the PBGC's pension plan termination insurance program. 29 U.S.C.

§ 1362(b). *Pension Benefit Guaranty Corporation v. Ouimet Corp.*, 630 F.2d 4, 9-12 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981). Judicial decisions which hamper the ability of pension plans or the PBGC to enforce control group liability will have an untoward effect on those entities. *See Pension Benefit Guaranty Corporation v. LTV Corp.*, 493 U.S. 932 (1990) (terminated single employer plan "had unfunded liabilities for promised benefits of almost $2.3 billion", of which "[a]pproximately $2.1 billion of this amount was covered by PBGC insurance.")

Beside the withdrawal liability setting, the Seventh Circuit's refusal to adhere to the express language of the spousal attribution rule will have a potentially significant effect upon the Secretary of the Treasury's enforcement of the Internal Revenue Code. The Treasury Regulations were originally promulgated to implement the "single employer" definition for purposes of determining the tax exempt status of pension, profit sharing and stock bonus plans under Sections 401, 408(k), 410, 411, 415 and 416 of the Internal Revenue Code. 26 U.S.C. § 414(c). Furthermore, the surtax exemption of 26 U.S.C. § 1563 contains the virtually identical attribution rules as the Treasury Regulations construed by the Seventh Circuit. 26 U.S.C. § 1563(e)(5). Allowing the Seventh Circuit's decision to stand without review by this Court will inject substantial "confusion" into these areas of federal pension and tax law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-3156

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

FERN SLOTKY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 2092—GEORGE W. LINDBERG, *Judge*

ARGUED NOVEMBER 8, 1993—
DECIDED NOVEMBER 17, 1993

Before POSNER, *Chief Judge*, and BAUER and EASTERBROOK, *Circuit Judges*

EASTERBROOK, *Circuit Judge*. Burton Slotky operated a business (Stevens Bedding Warehouse, Inc.) that withdrew from a multi-employer pension plan. We held that he is responsible for his firm's withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 because he leased two parcels of property to Stevens Bedding, and these leases—by Burton as sole proprietor of the properties to a corporation of which he was the sole shareholder—made him part of a group under "common control" for purposes of 29 U.S.C. § 1301(b)(1). *Central States Pension Fund v. Slotky*, 956 F.2d 1369

(7th Cir. 1992). This case poses the question whether Burton's wife Fern Slotky is similarly obligated. The district court held not.

The argument that she is liable depends on a rule of taxation, 26 C.F.R. § 1.414(c)-4(b)(5), made applicable to pension cases by regulations of the Pension Benefit Guarantee Corporation, 29 C.F.R. § 2612.2. Tax law deems each spouse an "owner" of the other's property under specified circumstances. According to the pension fund, these regulations deem Fern Slotky an owner of Burton Slotky's leasing business. This, the fund submits, makes Fern a proprietor (more accurately, a partner), which leads to unlimited personal liability. *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993), rejects the final step of this argument. *Johnson* holds that a spouse may own property used in a business without becoming a proprietor or partner in that business, and that the spouse therefore becomes liable for a control group's withdrawal liability "only when [both spouses] intended to be partners in that enterprise." *Id.* at 388. A footnote in *Central States Pension Fund v. Ditello*, 974 F.2d 887, 891 n.1 (7th Cir. 1992), appears to stand for a contrary proposition, but *Johnson* properly treated this observation as dictum. It did not affect the liability of the parties to the case, see 991 F.2d at 390 n.4, and the panel in *Ditello* did not separate the question of ownership from the issue of partnership.

Plaintiffs insist that *Johnson* was wrongly decided, but we see no need to revisit the subject. Ownership without partnership is a common device. The lessor of office space to a law firm does not become a partner in the firm and assume responsibility for its debts. The pension fund evidently believes that the IRS regulations deem a spouse an "owner" not of the property but of the "proprietorship," a concept that is hard to grasp. No one "owns" a proprietorship or partnership; it is just a name for a business carried on by natural persons without the shield of limited liability. People may own assets used in a part-

nership without being partners; people may be partners without owning any of the association's assets. *Johnson* understands the tax regulations as making the spouse an owner of particular assets; whether the owner of assets used in a business is liable as a partner depends, we held in *Johnson*, on the intent of the parties involved. Plaintiffs have not offered to prove that Burton and Fern Slotky intended to form a partnership or operated the leasing business as partners. Accordingly, the district judge properly held that Fern Slotky is not liable for the debts of the "group" her husband formed and controlled.

This is no more a "loophole" in the MPPAA than is the fact that Burton could have incorporated his leasing business, which (if corporate forms were observed) would have insulated Fern's assets from the pension fund's grasp. The MPPAA does not contain any rules for spousal liability. These depend on federal common law, and *Johnson* concluded that federal law does not equate the ownership of assets with partnership.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number 92 C 2092

GEORGE W. LINDBERG, Judge

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*

v.

SLOTKY

DEFENDANT'S MOTION TO DISMISS

Date August 20, 1992

Defendant's motion to dismiss is granted. The action is dismissed with prejudice. Status hearing set for November 19, 1992 is stricken.

ORDER

The parties are agreed that the precise issue on which defendant Fern Slotky's motion to dismiss is premised was addressed in *Central States, Southeast and Southwest Areas Pension Fund v Johnson*, 778 F Supp 425 (N D Ill 1991). They disagree in that defendant contends that *Johnson* was correctly decided and should be followed while plaintiffs contend that *Johnson* was incorrectly decided and should not be followed.

This court has carefully reviewed the *Johnson* opinion, and finds it not only to be well-reasoned but correct. The court adopts that reasoning in granting defendant's motion to dismiss, and would only add the following observation to that reasoning.

The statute authorizing the regulations relevant to this case provides:

> For purposes of this subchapter, under regulations prescribed by the [Pension Benefit Guaranty] corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

29 USC § 1301(b)(1). To the extent it touches on this statute, plaintiff's argument focuses on second sentence quoted. However, the regulations are those "prescribed under the preceding sentence," which therefore also limits the scope of permissible regulations pursuant to the statute. As previously noted, that sentence states:

> [A]ll employees of trades or businesses . . . which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer.

29 USC § 1301(b)(1). It is to give effect to this provision that regulations are authorized. 29 USC § 1301 (b)(1). The *Johnson* opinion's interpretation of the regulations both gives effect to this provision of the statute and keeps the regulations within the bounds permissible under the statute. Plaintiffs' interpretation does neither.

It is apparent based on the nature of the issue that plaintiffs' failure to state a claim is not remediable by amendment of the complaint. Therefore, dismissal of the action is being ordered with prejudice.

/s/ George W. Lindberg

STATUTE AND REGULATIONS INVOLVED

Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1301 (b)(1), provides:

> § 4001. Definitions
>
> * * * *
>
> (b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent with and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

Pension Benefit Guaranty Corporation Regulation § 2612.1, 29 C.F.R. § 2612.1, provides:

> § 2612.1 Purpose and scope.
>
> (a) Section 4001(b) of the Employee Retirement Income Security Act of 1974 (88 Stat. 1003) provides in part, "[f]or purposes of this title, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." The purpose of this part is to prescribe regulations to determine the trades or businesses that shall be treated as a single employer for purposes of Title IV of the Act.

(b) This part applies with respect to all plans to which § 4021 of the Act (88 Stat. 1014 *et seq.*) applies and which terminate:

(1) After June 30, 1974 and before September 2, 1974 and which have complied with the requirements of § 4082(b) of the Act (88 Stat. 1034); or,

(2) After September 1, 1974.

Pension Benefit Guaranty Corporation Regulation § 2612.2, 29 C.F.R. § 2612.2 provides:

§ 2612.2 Definitions.

For purposes of this part:

"Act" means the Employee Retirement Income Security Act of 1974 (88 Stat. 829 *et seq.*).

"Trades or businesses (whether or not incorporated) which are under common control" has the same meaning as in § 414(c) of the Internal Revenue Code of 1954, added by § 1015 of the Act (88 Stat. 925), and the regulations issued thereunder.

Treasury Regulation § 1.414(c)-2, 26 C.F.R. § 1.414(c)-2, provides in relevant part as follows:

§ 1.414(c)-2 Two or more trades or businesses under common control

(a) *In general.* For purposes of this section, the term "two or more trades or businesses under common control" means any group of trades or businesses which is . . . a "brother-sister group of trades or businesses" as defined in paragraph (c) of this section . . . . For purposes of this section and §§ 1.414(c)-3 and 1.414(c)-4, the term "organization" means a sole proprietorship, a partnership . . ., a trust, an estate, or a corporation.

* * * *

(b) *Parent-subsidiary group of trades or businesses under common control*—(1) *In general.* . . .

* * * *

(2) *Controlling interest defined*—(i) *Controlling interest.* For purposes of paragraphs (b) and (c) of this section, the phrase "controlling interest" means:

(A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

* * * *

(D) In the case of an organization which is a sole proprietorship, ownership of such sole proprietorship.

* * * *

(c) *Brother-sister group of trades or businesses under common control*—(1) *In general.* The term "brother-sister group of trades or businesses under common control" means two or more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates or trusts own (directly and with the application of § 1.414(c)-4) a controlling interest in each organization, and (ii) taking into account the ownership of each such person only to the extent such ownership is identical with respect to each such organization, such persons are in effective control of each organization. The five or fewer persons whose ownership is considered for purposes of the controlling interest requirement for each organization must be the same persons whose ownership is considered for purposes of the effective control requirement.

(2) *Effective control defined.* For purposes of this paragraph, persons are in "effective control" of an organization if—

(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote or more than 50 percent of the total value of shares of all classes of stock of such corporation.

* * * *

(iv) In the case of an organization which is a sole proprietorship one of such persons owns such sole proprietorship.

Treasury Regulation § 1.414(c)-4, 26 C.F.R. § 1.414(c)-4, provides in relevant part as follows:

§ 1.414(c)-4 Rules for determining ownership

(a) *In general.* In determining the ownership of an interest in an organization for purposes of §1.414 (c)-2 and § 1.414(c)-3, the constructive ownership rules of paragraph (b) of this section shall apply, subject to the operating rules contained in paragraph (c). For purposes of this section the term "interest" means: in the case of a corporation, stock; in the case of a trust or estate, an actuarial interest; in the case of a partnership, an interest in the profits or capital; and in the case of a sole proprietorship, the proprietorship.

(b) *Constructive ownership—*

* * * *

(5) *Spouse*—(i) *General rule.* Except as provided in paragraph (b)(5)(ii) of this section, an individual shall be considered to own an interest owned, directly or indirectly, by or for his or her spouse, other than a spouse who is legally separated from the individual under a decree of divorce, whether interlocutory or final, or a decree of separate maintenance.

(ii) *Exception.* An individual shall not be considered to own an interest in an organization owned, directly or indirectly, by or for his or her spouse on any day of a taxable year of such organization, provided that each of the following conditions are satisfied with respect to such taxable year:

(A) Such individual does not, at any time during such taxable year, own directly any interest in such organization;

(B) Such individual is not a member of the board of directors, a fiduciary, or an employee of such organization and does not participate in the management of such organization at any time during such taxable year;

(C) Not more than 50 percent of such organization's gross income for such taxable year was derived from royalties, rents, dividends, interest, and annuities; and

(D) Such interest in such organization is not, at any time during such taxable year, subject to conditions which substantially restrict or limit the spouse's right to dispose of such interest and which run in favor of the individual or the individual's children who have not attained the age of 21 years. The principles of § 1.414(c)-3(d)(6)(i) shall apply in determining whether a condition is a condition described in the preceding sentence.

(iii) *Definitions.* For purposes of paragraph (b)(5)(ii)(C) of this section, the gross income of an organization shall be determined under section 61 and the regulations thereunder. The terms "interest", "royalties", "rents", "dividends", and "annuities" shall have the same meaning such terms are given for purposes of section 1244(c) and § 1.1244(c)-1(e)(1).

* * * *

(c) *Operating rules*—(1) *In general.* Except as provided in paragraph (c)(2) of this section, an interest constructively owned by a person by reason of the application of paragraph (b)(1), (2), (3), (4), (5), or (6) of this section shall, for the purposes of applying such paragraph, be treated as actually owned by such person.

(2) *Members of family.* An interest constructively owned by an individual by reason of the application of paragraph (b)(5) or (6) of this section shall not be treated as owned by such individual for purposes of again applying such subparagraphs in order to make another the constructive owner of such interest.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3185

PENSION BENEFIT GUARANTY, CORPORATION,
Plaintiff-Appellant,

v.

EAST DAYTON TOOL AND DIE COMPANY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed January 24, 1994

Before: KEITH and NORRIS, Circuit Judges; and ZATKOFF, District Judge.*

DAMON J. KEITH, Circuit Judge. Plaintiff/Appellant Pension Benefit Guaranty, Corp. ("PBGC") appeals the district court's judgment finding the Defendants/Appellees East Dayton Tool and Die Co., Inc. ("East Dayton"), et al., did not control East Dayton's pension plan on its termination date and therefore, were not liable for the pension plan's unfunded benefit liabilities, and its subsequent grant of individual Appellees' 12(b)(6) motion.

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

For the reasons stated below, we REVERSE and REMAND.

I.

In 1959, East Dayton, an Ohio corporation that designed, manufactured and sold tools and dies, established the East Dayton Tool & Die Restated Retirement Plan for Salaried Employees (the "Plan") which qualified for coverage under Title IV of the Employee Retirement Income Security Act ("ERISA"). Dorothy Darrow ("Darrow"), the daughter of East Dayton's founder, eventually inherited 100% of East Dayton stock.

On August 23, 1973, Darrow sold East Dayton's common shares for $1.35 million to Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman"), Robert M. Tormey ("Tormey"), individual Appellees, and Clifton C. Hawkins, Jr. ("Hawkins").[1] The individual Appellees each purchased 30% of the stock and Hawkins purchased the remaining 10%. In return for the stock, individual Appellees gave Darrow $150,000 in cash and a $1.2 million promissory note secured by the voting rights of East Dayton stock and the right to compel the sale of East Dayton stock upon default. The shares of stock, although pledged to Darrow, were held in escrow by Third National. The loan documents provided upon default, Darrow could either compel the sale the stock or elect at least two directors to East Dayton's Board of Directors.[2]

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[1] Hawkins was not sued in his individual capacity, and therefore he is not included in the collective reference to "individual Appellees."

[2] The Escrow Agreement in pertinent part provided:

> 2. So long as Company [East Dayton] shall well and truly pay the promissory note according to its terms and tenor, the said stock certificates shall be held by the Escrow Agent, and Shareholders shall continue to have all the rights of ownership, except possession and transfer rights.
>
> 3. Upon written notice given to Escrow Agent by Darrow of default in the payment of any installment of interest or prin-

At the time of stock acquisition, each individual Appellee owned one-third of the holding company Roscommon Financial Corporation ("Roscommon Financial"). In February 1974, the individual Appellees transferred their East Dayton stock to Roscommon Financial. Shortly thereafter, Roscommon Financial acquired Hawkins' stock and became East Dayton's sole shareholder.

On January 26, 1976, after operating East Dayton for two and half years, Roscommon Financial defaulted on Darrow's loan. Darrow refused to consent to a loan which would have allowed Roscommon Financial to continue business, and instead, pursuant to the options provided in the loan documents, appointed two directors to East Dayton's Board. On February 7, 1976, the newly elected East Dayton Board decided to liquidate East Dayton and to repay Darrow with the proceeds. The individual Appellees did not approve of or participate in the decision to liquidate. At that time, because Darrow had control of the voting rights of the stock, Granzow offered to formally transfer the East Dayton stock from the escrow agent to Darrow. Darrow refused.

On April 26, 1976, East Dayton filed a Notice of Intent to Terminate the Plan with PBGC. After an investigation, PBGC notified East Dayton its Plan assets were insufficient by $326,362 to satisfy the benefits guaranteed by ERISA under Title IV. On April 27, 1976, East Dayton, with Granzow acting as President, and PBGC agreed to terminate the Plan, effective May 15, 1976, and to appoint PBGC the statutory trustee of the Plan.

---

cipal due according to the terms of said promissory note, then Escrow Agent shall either (i) cause the shares to be sold as hereinafter set forth, or (ii) shall cause the immediate election to the Board of Directors of the Company, of not less than two persons chosen by Darrow or her executors or assigns; said directors to continue in office until the Company cures the default, or, in the event the default cannot be cured in the opinion of the two directors, then Escrow Agent shall [sell the stock]. . . .

The parties agreed on the plan termination date, May 15, 1976, Roscommon Financial owned: (1) 100% of the East Dayton stock; (2) 88% of Dayton Casting Company stock; and (3) 90% of Advance Foundry Company stock. The parties also acknowledged the individual Appellees each owned 1/3 interest in the partnership Roscommon Realty.[3] PBGC, therefore, determined East Dayton, Roscommon Financial, Dayton Casting, Advance, Roscommon Realty and two other entities (later found not liable by PBGC) were members of the same control group as defined by 29 U.S.C. § 1301(b), and therefore, were jointly liable for the amount of $326,362.

On May 6, 1981, the Roscommon Group appealed PBGC's initial liability determination to PBGC's Appeals Board. On appeal, Roscommon Group argued they were not a control group for liability purposes because Roscommon Financial did not control East Dayton on the plan termination date. The Roscommon Group noted the loan documents, upon default, divested them of all authority and vested control in Darrow.

On April 28, 1982, the Appeals Board issued the agency's final determination finding the Roscommon Group was a member of a commonly controlled group on the plan termination date under § 4001(b) of ERISA. As such, the Roscommon Group qualified as an "employer" which maintained the Plan and was liable for the guaranteed benefits. The Appeals Board noted the Roscommon Group's tax returns indicated 100% ownership of East Dayton. This ownership entitled the Roscommon Group to $2 million in tax deductions. PBGC imposed liability upon the Roscommon Group but not upon the individual Appellees.

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[3] Roscommon Financial, Roscommon Realty, East Dayton, Dayton Casting Company, Inc. Advance Foundry Company, Inc., and individual Appellees are collectively referred to as the Roscommon Group.

On May 13, 1982, PBGC sought enforcement of the agency's determination in the United States District Court for the Southern District of Ohio. On June 22, 1982, the Roscommon Group filed an Answer, Counterclaim and a Motion for Judgment on the Pleadings. Simultaneously, the individual Appellees filed a Motion to Dismiss PBGC's complaint. Because both motions relied on the evidence in the administrative record, both were treated as summary judgment motions and were denied.

On January 23, 1985, the district court referred the case to a magistrate. The magistrate, relying on the reasoning in *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) ("Challenge Stamping"), concluded once Roscommon Financial defaulted, the loan documents effectively transferred control to Darrow prior to the termination date. The Roscommon Group was not an employer controlling East Dayton on the Plan's termination date, and therefore, was not liable for East Dayton's unfunded benefit liabilities. The district court adopted the magistrate's recommendation and entered judgment for the Appellees. The district court also granted individual Appelees' Rule 12(b)(6) Motion to Dismiss because PBGC failed to state a cause of action with respect to them. This timely appeal followed.

II.

On appeal, PBGC argues the district court incorrectly utilized a subjective test in blatant disregard for Congress' express intent that an objective test be used to identify trades or businesses under "common control" for purposes of 29 U.S.C. § 1301(b). Additionally, PBGC argues the district court erroneously granted the individual Appellees' Motion to Dismiss. Each allegation of error will be discussed below.

A.

PBGC argues Congress expressly defined an employer for Title IV liability purposes as trades or businesses under common control with the pension plan sponsor.

Further, Congress explicitly authorized PBGC to define trades and businesses under "common control" for the imposition of liability for the termination of underfunded pension plans. PBGC clearly defined "common control" as an ownership interest of 80% of the total combined voting classes or of the total value of all shares of all classes of stock connecting a group of trades and businesses ("80% control test"). Therefore, according to PBGC, the judiciary must apply PBGC's test unless the regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Thus, PBGC argues the district court erred in holding that *Challenge Stamping* was controlling precedent for this case. We agree.

1.

In January 1981, PBGC issued its initial determination advising Roscommon Financial that under 29 U.S.C. § 1362, (1) the plan sponsor and all members of its control group were liable for pension plan underfunding upon plan termination; (2) on the date of plan termination, the Roscommon Group constituted a controlled group with East Dayton as defined under Title IV; and (3) that each company in the Roscommon Group was jointly and severally liable to PBGC for $326,362.00.

On appeal, disregarding arguments of actual control, PBGC's Appeals Board applied PBGC's 80% control test to the uncontested facts regarding ownership and concluded:

> East Dayton, Roscommon, Dayton, Casting, Advance Foundry, . . . and Roscommon Realty were, on the date the Plan terminated, members of a commonly controlled group under ERISA § 4001(b) and therefore constitute the 'employer' that maintained the Plan.

Additionally, the Appeals Board noted Roscommon Financial filed federal income tax returns on its own behalf and on behalf of the members of the Roscommon Group.

In the tax returns Roscommon Financial stated it owned 100% of East Dayton's stock. The tax returns also indicated Roscommon Financial and East Dayton constituted a controlled group under the Federal Tax Code, and therefore, was entitled to approximately $2 million in tax deductions.

The district court, however, decided as a matter of law, *Challenge Stamping* was the controlling law in this case. In *Challenge Stamping*, this court reasoned that:

> There is no support for a view that Congress' chief intent in employing this test in ERISA was to invade the deepest pocket in a business failure, regardless of its responsibility to "continue funding" a pension plan of a controlled company. The purpose of the 80% regulation is obviously to find the party in control. When, by operation of bankruptcy law, a party is actually denied control, there is no reason to apply the regulation.

719 F.2d at 151. This court stated the conclusion in *Challenge Stamping* did not invalidate the 80% control test or establish a per se rule for all bankruptcies. *Id.* Instead, this court merely concluded the "stock did not provide any measure of control over [the corporation] at the date of termination, and thus, the regulation did not apply." *Id.* The district court opined that this case fell directly within the parameters of *Challenge Stamping*'s facts stating:

> The allegation that [Challenge Stamping] applies only in bankruptcy contexts is without merit. In [Challenge Stamping], the Sixth Circuit did not limit its pronouncement to bankruptcy scenarios. Rather, the [Challenge Stamping] court looked to the totality of the circumstances surrounding corporate operations and actual control over the owned company or over the pension plan to determine whether or not the 80% stock ownership rule accurately defined the party with a controlling interest. In this Court's

> opinion, the means by which corporate control is lost is not relevant. Regardless of the means that effectuate the loss of control, the same result is achieved—the loss of control over the company operations and the pension plan. Thus, whether a company is stripped of its control by a bankruptcy court or by a secured creditor, as in this case, is insignificant; it is a distinction without a difference.

We review district court conclusions of law *de novo*. *Feldpausch v. Heckler*, 763 F.2d 229, 230 (6th Cir. 1985). After a de novo review of the record, we disagree with the district court's conclusion *Challenge Stamping* controls the instant case. In *Challenge Stamping*, a bankruptcy case, the stock purchaser *never* had actual control over the company involved or over its pension plan. Here, Roscommon Financial actually controlled East Dayton and its Plan for two and a half years. In applying *Challenge Stamping*, the district court ignored the purposes of ERISA by not imposing liability on Roscommon Financial and its controlled group for East Dayton's unfunded benefit liabilities. Because the Roscommon Group controlled East Dayton and its Plan for over two and a half years, *Challenge Stamping*'s reasoning is inapplicable. Thus, the district court erred in not applying ERISA's brightline 80% control test.

2.

Under ERISA, when a single employer pension plan is terminated, an employer is liable for the total amount of unfunded benefit liabilities on the plan termination date. 29 U.S.C. § 1362(a) (Supp. 1993). ERISA provides "all . . . trades or businesses . . . under common control shall be treated as . . . a single employer." 29 U.S.C. § 1301(b)(1). Pursuant to the statute, the PBGC defined "common control" as "one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest . . . ." 26

C.F.R. § 11.414(c)-2(b)(1). PBGC further defined a controlling interest in the case of a corporation as:

> ownership of stock possessing at least 80 percent of the total combined voting of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

26 C.F.R. § 11.414(c)-2(b)(2)(a).

The parties do not dispute the Roscommon Group entities qualify as businesses under ERISA. Here, the individual Appellees equally owned Roscommon Financial and Roscommon Realty. The parties agreed on the termination date Roscommon Financial owned: (1) 100% of East Dayton stock; (2) 88% of Dayton Casting Company, Inc. stock; and (3) 90% of Advance Foundry Company, Inc. stock. Thus, all the businesses were connected through common ownership. Additionally, because the ownership exceeds 80% of the total value of stock in each business, its qualified as a "controlling" interest under ERISA. Therefore, PBGC's Appeals Board correctly concluded the Roscommon Group was a group of businesses connected through a controlling interest which qualified as an employer under section 1301(b). Consequently, we REVERSE the district court's judgment and find the members of the Roscommon Group are jointly and severally liable for East Dayton's unfunded benefit liabilities.

B.

PBGC argues the district court erred in approving the magistrate's recommendation and granting the individual Appellees' motion to dismiss. Specifically the magistrate found "PBGC has not requested a judgment against Granzow, Sherman and Tormey as individuals, and therefore, a dismissal should be granted to Defendants. The Court also notes that even if a demand is made in the Complaint as against those Defendants, a dismissal

would still be in order since their liability, if any, would have to be derivative from the liability if the organizational Defendants and they should be granted summary judgment." We disagree.

We review a district court's grant of a Rule 12(b)(6) motion *de novo*. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867 (1910); *Dana Corp. v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 885 (6th Cir. 1990). Here, the district court erroneously concluded PBGC's complaint failed to request judgment against the individual Appellees. Rule 54(c) provides "every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading." Fed. R. Civ. P. 54(c). If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), omissions in a prayer for relief do not bar redress of meritorious claims. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 66 (1978).

The complaint named the partnership Roscommon Realty as a Defendant. Both Ohio law and ERISA provide joint and several liability for partners where partnership debts exist. Ohio Rev. Code Ann. § 1775.14(B) (Anderson 1992); *see* 46 Fed. Reg. 9520, 9522-23 (Mar. 1, 1981); *Central States, Southeast & Southwest Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6 (W.D. Mich. 1987), *aff'd mem.*, 892 F.2d 1043 (6th Cir. 1990). In its complaint, PBGC explicitly sought recovery for the unfunded benefit liabilities from each of the Roscommon Group members including the partnership Roscommon Realty. The complaint, therefore provided individual Appellees notice of PBGC's claims and the grounds for those claims. Additionally, PBGC's complaint contained a general prayer for relief "requesting such other legal or equitable relief as may be just and proper." Other legal or equitable relief implicitly includes

relief from individual partners where the partnership assets prove insufficient. Thus, we find PBGC's complaint states a cause of action against the individual Appellees.

Before a creditor can seek partners' individual assets, Ohio law requires a specific determination that partnership assets are insufficient to meet partnership debts. *See Wayne Smith Constr. Co. v. Wolman*, 65 Ohio St. 3d 383, 391, 604 N.E.2d 157, 163 (1992). That issue, however, is not before us. The determination of the sufficiency of the partnership assets is a finding of fact and is properly determined by the district court. We, therefore, REVERSE the district court's grant of individual Appellees' Motion to Dismiss and REMAND for reconsideration consistent with this opinion.

III.

For the reasons stated above, we REVERSE and REMAND.

Supreme Court, U.S.
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No. 93-1303

In The

Supreme Court of the United States

October Term, 1993

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,

Petitioners,

v.

FERN SLOTKY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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11 pp

QUESTION PRESENTED

Should the spouse of the owner of a business which incurred withdrawal liability under ERISA be personally liable for that withdrawal liability solely by reason of the marital relationship?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE PETITION 2

I. THERE IS NO CONFLICT WITH OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE REGULATION IN QUESTION 2

II. THE DECISION BELOW RAISES NO SIGNIFICANT PROBLEMS CONCERNING THE COLLECTION OF WITHDRAWAL LIABILITY 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra, 983 F.2d 495 (3rd Cir. 1992) 5

Central States Pension Fund v. Ditello, 974 F.2d 887 (7th Cir. 1992) 5

Central States Pension Fund v. Johnson, 991 F.2d 387 (7th Cir. 1993) 5, 6

IUE AFL-CIO Pension Fund v. Barker & Williamson Inc., 788 F.2d 118 (3rd Cir. 1986) 5

Western Conference of Teamsters Pension Trust Fund v. LaFrenz, 837 F.2d 892 (9th Cir. 1988) 2, 4

STATUTES

29 U.S.C. §1301(b) 2, 3, 6

REGULATIONS

29 C.F.R. §2612.1 ..... 2, 3

29 C.F.R. §2612.2 2

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent accepts the descriptions of the Jurisdiction, Statute and Regulations Involved and Statement of Facts involved in this case, which appear on pages 2 through 6 of the Petition.

Respondent strongly disagrees, however, with the statement of the Question Presented which appears on page (i) of the Petition. Neither the holding of the Seventh Circuit below nor the position of the Respondent requires any finding of a "significant interest" in a trade

or business. Rather, Respondent argues that where neither ownership of business assets nor participation in *any* business is alleged, there can be no spousal liability.

REASONS FOR DENIAL OF THE PETITION

I. THERE IS NO CONFLICT WITH OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THE REGULATION IN QUESTION.

The sole question presented is whether 29 U.S.C. §1301(b) and the so-called "Attribution Rules" promulgated by the Pension Benefit Guaranty Corporation ("PBGC"), pursuant thereto, 29 C.F.R. §2612.1 and § 2612.2, dictate the result Petitioner desires.

Petitioner argues that the decision of the Seventh Circuit is in conflict with *Western Conference of Teamsters Pension Trust Fund v. LaFrenz*, 837 F.2d 892 (9th Cir. 1988). Petitioner is incorrect; the holdings in *LaFrenz* and in this case are completely consistent. In *LaFrenz*, the husband owned the controlling stock in a corporation (Pre-Mix Concrete, Inc. or "Pre-Mix") which had incurred withdrawal liability. In addition, he *and his wife* owned as proprietors an unincorporated truck leasing business. The court did indeed state that "whether Anita LaFrenz actually had an ownership interest in Pre-Mix is immaterial." *Id.* at 894. Respondent agrees. Respondent disagrees, however, with the Petitioner's illogical leap to the notion that it is also immaterial whether the wife actually had an ownership in the unincorporated truck leasing business; Mrs. LaFrenz clearly did and that distinction is crucial in distinguishing the two cases.

The purpose of the Attribution Rules is clearly stated in 29 C.F.R. §2612.1:

> "The purpose of this part is to prescribe regulations to determine the trades or businesses that shall be treated as a single employer for purposes of Title IV of the Act."

Thus, in the typical case involving the Attribution Rules, two trades or businesses *with differing ownership* are present. The question which the Attribution Rules addresses is whether these two businesses are to be treated as a single employer for purposes of determining whether they are jointly liable for the withdrawal liability of one of them, as is dictated by 29 U.S.C. §1301(b). That will depend on whether the two trades or businesses are "under common control," and the Attribution Rules prescribe a method of determining whether they in fact are under common control.

In the case at hand, there are two businesses in question:

1. Stevens Bedding, Inc., a corporation wholly owned by Respondent's husband, Burton Slotky, and the business which incurred withdrawal liability.

2. An unincorporated business owned and operated by Burton Slotky, which leased real estate.

The Respondent is not alleged to have any interest whatsoever in either business. There is no reason to resort to any Attribution Rules to reach the conclusion that *both businesses* are under common – in fact *identical* – control and thus should be treated as a single employer. The

inquiry is at an end simply by stating the facts. Thus, the Attribution Rules, whose purpose is "to determine the trades or businesses that shall be treated as a single employer . . . ," are unnecessary to reach the proper result.

The contrast with *LaFrenz* is stark. There the two businesses were as follows:

> 1. Pre-Mix, a corporation *owned solely by the husband, Mr. LaFrenz,* which had incurred withdrawal liability.
>
> 2. An unincorporated business owned *jointly by Mr. LaFrenz and his wife.*

Since the husband did not own both businesses entirely (presumably owning only 50% of the unincorporated business), resort was necessary to the Attribution Rules to determine whether the unincorporated business was in fact under common control with the Pre-Mix. Since under those Rules the husband was deemed to own the interest of his wife in the unincorporated business, they were found to be under common control.

To suggest, therefore, that *LaFrenz* is in conflict with the Seventh Circuit in this case is to ignore the interest of Mrs. LaFrenz in the unincorporated business. Mrs. Slotky, the Respondent, owns no interest in the property or the trade or business constituting the unincorporated leasing business. Petitioner has asserted liability against Mrs. Slotky – a total stranger to both businesses – solely by reason of *her* status as Burton Slotky's wife and *his* ownership of an unincorporated business. Mrs. LaFrenz, however, was indisputably the owner of an interest in an unincorporated trade or business and as such an owner

was liable for its debts. Thus, the two holdings are perfectly consistent.

The other cases cited on pp. 9 and 10 of the Petition, *Board of Trustees of Trucking Employees of North Jersey Pension Fund v. Centra*, 983 F.2d 495 (3rd Cir. 1992) and *IUE AFL-CIO Pension Fund v. Barker & Williamson Inc.*, 788 F.2d 118 (3rd Cir. 1986) have absolutely nothing to do with spousal liability or any concept remotely analogous thereto. Further, *Central States Pension Fund v. Ditello*, 974 F.2d 887, 891 n.1 (7th Cir. 1992) did appear to adopt, *in dicta*, the interpretation of the Rules espoused by Petitioner, but (a) that position was subsequently rejected by the same court which had decided *Ditello* in *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993) and (b) as noted in Respondent's Motion to Dismiss, R. 7 and 8, the attorney for Mrs. Johnson failed even to argue to the court that such an application of the Attribution Rules was improper.

II. THE DECISION BELOW RAISES NO SIGNIFICANT PROBLEMS CONCERNING THE COLLECTION OF WITHDRAWAL LIABILITY.

Petitioner raises the specter that to deny the Petition and fail to reverse in this case would have an "untoward effect" on the ability of pension plans and the PBGC to collect unfunded liabilities. Petition at 14-15. While it would be futile to dispute Petitioner's tautological assertion that it would enhance the revenue producing capacity of multi-employer plans and PBGC to make wives liable for the withdrawal liability of their husbands simply because of their status, it would also be true that the

collection of multi-employer plans' withdrawal liability would also be enhanced by making, say, children, siblings and cousins jointly liable for such liability.[1]

To focus on the revenue enhancement effects of the opinion below of course evades the question which must be answered – what is the meaning of 29 U.S.C. §1301(b)(1), pursuant to which the Attribution Rules were adopted? The answer to that question is unmistakable: trades or businesses which are under common control are liable jointly for the withdrawal liability of any one of them.

Respondent's position, and the holding of the court below, is simple – in order for Respondent to be liable for any ERISA withdrawal liability under §1301(b), she must be found to have participated as an owner in an *unincorporated* trade or business for whose debts under federal or state common law, she would be personally liable. Since there is no such participation, she cannot be held liable.

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[1] It is interesting to note that the PBGC, the author of the Attribution Rules, had a recent opportunity to adopt the position taken by Petitioner and declined to do so. *See* Brief of *Amicus Curiae* of PBGC in *Central States Pension Fund v. Johnson*, *supra*, (No. 92-1088) which argued for a rule which required a determination under federal common law of whether the wife was actually associated in some way with an unincorporated trade or business, other than merely by reason of her status as the spouse of the owner thereof.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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